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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

The opinion below of the Court of Appeals (R.) is reported at 307 F.2d 62.

Jurisdiction

The judgment of the court of appeals was entered on July 27, 1962. A petition for rehearing was denied on October 23, 1962. The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Harlan

to and including December 3, 1962 and the petition was filed on November 29, 1962. The petition was granted on June 10, 1963. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1), Supreme Court Rule 19-1 (a) and 19-1 (b) and Rule 26, Federal Rules of Criminal Procedure.

Questions Presented

I. Are a defendant's incriminating statements made in the absence of his retained counsel after the formal proceeding has been initiated by his arraignment and indictment admissible over objection, in a federal criminal trial?

II. May a government agent testify, over objection, to damaging admissions made by an accused to an informer which the agent overheard by means of an electronic eavesdropping device, which was secreted with the consent of the informer underneath the front seat of his automobile, when the informer who, surreptitiously elicited the admissions from the accused is not called to testify by the prosecution?

Constitutional Provisions Involved

The Fourth Amendment to the Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides, in pertinent part:

> No person • • • shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law • • • .

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall • • • have the assistance of counsel for his defense.

Statute Involved

The Federal Rules of Criminal Procedure, Rule 26 provides as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress, or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

Statement

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of New York of violating the narcotics laws. Petitioner was charged with possession of narcotics on board a United States vessel, in violation of 21 U.S.C. 184 (a), importation of narcotic drugs in violation of 21 U.S.C. 174, dealing in narcotics not in the original stamped package, in viola-

tion of 26 U.S.C. 4704 (a), and conspiracy to commit the several offenses. The conspiracy convictions were reversed and remanded for a new trial, while petitioner's substantive convictions, for which nine year concurrent sentences had been imposed, were affirmed, one judge dissenting. The salient facts are as follows:

Petitioner was arrested on May 6, 1958 and was thereafter arraigned without undue delay. He was indicted on May 28, 1958 and charged with a substantive violation of 21 U.S.C. Section 184 a. On July 20, 1959 he was reindicted upon a superseding indictment charging substantive and conspiracy violation of 21 U.S.C. Section 184 a and conspiracy in violation of 21 U.S.C. Sections 173, 174. On March 3, 1961 a second superseding indictment was returned which named additional co-defendants, and additional counts. This second superseding indictment was made possible in part by the information surreptitiously obtained from petitioner. The former indictment was dismissed and it was upon the latter indictment that petitioner was tried and convicted.

On July 22, 1959, having previously retained counsel, petitioner, along with Colson, a co-defendant, pleaded not guilty and was released on bail. Thereafter, without Massiah's knowledge, Colson decided to co-operate with the government. On November 19, 1959 a customs investigator, Finbarr Murphy, placed an electronic eavesdropping device in Colson's car with Colson's consent and instructed him to invite Massiah to take a ride with him in the car and to engage Massiah in conversation relating to the alleged crimes. Murphy, in another car was able to pick up this conversation. At the trial, he testified to certain damaging admissions, elicited from the petitioner by Colson, that he was able to overhear in this manner. Petitioner's counsel objected, without success, to the admission of Murphy's

testimony. The action against Colson and several others was severed. Colson was not called to testify by the prosecution and did not appear at the trial.

Summary of Argument

The admission of Agent Murphy's testimony over objection was reversible error for two reasons:

I. Incriminating statements elicited from an accused by a special government agent, in the absence of his counsel, after the commencement of the formal criminal proceeding, are inadmissible in a federal criminal trial.

II. A government agent may not testify in a federal criminal trial to damaging admissions made by an accused, which he overheard through an electronic eavesdropping device, when the informer who surreptitiously elicited the admissions from the defendant is not called to testify by the prosecution.

ARGUMENT

I.

Reversible Error Was Committed by the Receipt Into Evidence, Over Objection, of the Petitioner's Incriminating Statements Made in the Absence of Counsel, After the Formal Criminal Proceeding Had Been Commenced, by Arraignment and Indictment.

In *Spano* v. *New York*, 360 U.S. 315 (1959) a state criminal conviction was reversed on the ground that a confession coerced as a matter of law had been admitted into evidence. Four justices expressed the view that the confession was inadmissible and the conviction should be reversed without regard to the element of coercion because the police interrogated the defendant in the absence of counsel *Id.* at 324, 326. The question was left open by the remaining members of the court who speaking through the Chief Justice concluded that the confession violated the Fourteenth Amendment "under traditional principles" *Id.* at 320. Considering that a stricter standard of conduct is imposed by the federal courts upon federal law enforcement officials, see *McNabb* v. *United States*, 318 U.S. 332, 340 (1943); *Marshall* v. *United States*, 360 U.S. 310 (1959); *Gideon* v. *Wainwright*, 372 U.S. 335, 349-52 (1963) (concurring opinion, Harlan, *J.*), than is imposed upon their state counterparts, it is reasonable to assume that federal officers must deal through and not around an attorney retained by a defendant under indictment. *United States* v. *Massiah*, 307 F.2d 62, 72 (2d Cir. 1962) (dissenting opinion, Hays, *J.*); Sec. A.B.A. Canons of Ethics, Canon 9; Drinker, Legal Ethics 202 (1953), and that all statements taken from an indicted accused in the absence of his counsel are inadmissible in a federal criminal trial.

In *White* v. *Maryland*, 373 U.S. 59 (1963) the petitioner, after arrest, was taken before a magistrate for a preliminary hearing, and he pleaded guilty to a charge of murder without having the advice or assistance of counsel. An attorney was later appointed to represent him, and he pleaded not guilty at his formal "arraignment". However, the plea of guilty made at the preliminary hearing was introduced in evidence at his trial, without objection, and he was convicted and sentenced to death. The judgment of conviction was unanimously reversed. It was held that petitioner was denied due process under the Fourteenth Amendment when he was allowed to enter a plea of guilty, in the absence of counsel, before a magistrate. In response to the claims that a preliminary hearing in Maryland is not a critical stage in the criminal proceeding; that it was not necessary for the petitioner to enter a plea of guilty at that time; and that it was not then practical to appoint counsel for petitioner; the court answered that whatever may be the normal function of the "Preliminary hearing" under Maryland law, it was under the facts and circumstances of this case "critical" for the petitioner to make an admission of guilt before the magistrate at a time when he had no counsel, and his constitutional rights were violated thereby.

See also, *Hamilton* v. *Alabama*, 368 U.S. 52 (1962); *Chessman* v. *Teets*, 354 U.S. 156 (1957); *Reece* v. *Georgia*, 350 U.S. 85 (1956); *Chandler* v. *Fretag*, 348 U.S. 3 (1954); *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932) and Rule 44 Federal Rules Crim. Pro. (1946).

The right to counsel must be recognized and enforced not only by the courts when an accused appears without counsel but also by the representatives of the government at least once the criminal action has been formally instituted. As has been aptly observed,

"Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself, and such deprivation 'after indictment and before trial' may, indeed, be tantamount to the denial of effective representation by counsel at the only stage when legal aid and advice would help him."

Spano v. *New York, supra,* at 325-26 (concurring opinion, Douglas, *J.*).

Since *Spano,* the New York Court of Appeals has adopted a strict rule rendering inadmissible all statements made by an accused after the commencement of the formal criminal proceeding, either by arraignment or indictment, where not made in the presence of his attorney, on the grounds that they are obtained in violation of his constitutional right to counsel by "testimonial compulsion", and because their introduction into evidence violates the defendant's privilege against self-incrimination *People* v. *Davis,* 13 N.Y. 2d 690, —— N.E. 2d ——, 241 N.Y.S. 2d 172 (1963); *People* v. *Rodriquez,* 11 N.Y. 2d 279, 183 N.E. 2d 651, 229 N.Y.S. 2d 353 (1962); *People* v. *Meyer,* 11 N.Y. 2d 162, 182 N.E. 2d 103, 227 N.Y.S. 2d 427 (1962); *People* v. *Waterman,* 9 N.Y. 2d 561, 175 N.E. 2d 445, 216 N.Y.S. 2d 70 (1961); *People* v. *Di Biasi,* 7 N.Y. 2d 544, 166 N.E. 2d 825, 200 N.Y.S. 2d 21 (1960); *People* v. *Swanson,* 18 App. Div. 2d 832, 237 N.Y.S. 2d 400 (2d Dept. 1962); *People* v. *Price,* 18 App. Div. 2d 739, 235 N.Y.S. 2d 390 (3d Dept. 1962); *People* v. *Wallace,* 17 App. Div. 2d 981, 234 N.Y.S. 2d 579 (2d Dept. 1962); *People* v. *Karmel,* 17 App. Div. 2d 659, 230 N.Y.S. 2d 413 (2d Dept. 1962); *People* v. *Robinson,* 16 App. Div. 2d 184, 224 N.Y.S. 2d 705 (4th Dept. 1962).

"The initiation of a criminal action against the accused by the finding of an indictment operates to impose cer-

> tain disabilities upon the People. The People would manifestly not be permitted at the trial to call the defendant to the witness stand to establish their case through his testimony . . . By the same token, they may not circumvent the defendant's privilege against self-incrimination by introducing into evidence inculpatory statements obtained from him (following indictment) at a private examination prior to trial . . . " *People* v. *Waterman, supra* at 566, 175 N.E. 2d at 448, 216 N.Y.S. 2d at 75.

In *People* v. *Robinson, supra,* a case factually similar to the one at bar, the Appellate Division unanimously reversed a judgment of conviction because post arraignment statements made in response to a police informer's indirect and surreptitious interrogations and the fruits obtained as a consequence thereof were received in evidence. The accused after having been arrested and arraigned refused to answer questions put to him by the police. A police informer was placed in a cell adjoining his and two detectives secreted themselves within hearing distance. The informer in conversations with the defendant elicited from him what amounted to a full confession to a killing which occurred during a robbery, including the hiding place of the guns used. Upon the trial the overheard conversations were related in detail by the detectives and the guns were introduced in evidence. This was held to constitute reversible error.

On Lee v. *United States,* 343 U.S. 747 (1951), upon which the government has heretofore relied and which today at best, is doubtful authority, in the Federal Courts. See *Lopez* v. *United States,* 373 U.S. 427, 441-46 (1963) (concurring opinion), does not treat with the right to counsel issue raised herein. In *On Lee* a sharply divided court held that the use in a federal criminal case of testimony as to damaging admissions made by the accused, while on bail

pending indictment, in a conversation on the premises of the accused which the witness, a government agent outside such premises was enabled to overhear by a radio transmitter concealed on the person of an informer, the other party to the conversation, did not violate the constitutional immunity of the defendant from unreasonable searches and seizures; was not within the prohibition of the Federal Wire Tapping Act; and was not inconsistent with the requirements of fair play in federal law enforcement. The right to counsel issue advanced herein was never discussed by the court.

In the case at bar, it is respectfully submitted that the surreptitious interrogation of the petitioner by Colson, a special agent of the government, in the absence of his retained counsel, approximately one year and a half after the formal criminal proceeding had been instituted effectively violated his constitutional right to counsel and constituted "testimonial compulsion" *Spano* v. *New York, supra; White* v. *Maryland, supra; Leyra* v. *Denno,* 347 U.S. 556 (1953). The introduction of the incriminating statements obtained thereby violated his privilege against self-incrimination. *Bram* v. *United States,* 168 U.S. 532, 542 (1897); *Brock* v. *United States,* 223 Fed. 681 (5th Cir. 1955); *Bullock* v. *United States,* 122 Fed. 213, 215 (D.C. Cir. 1941); *People* v. *Rodriquez, supra, People* v. *Waterman, supra.*

Since the admissions were introduced against the petitioner generally on all of the counts of the indictment the judgment of conviction on the substantive counts which were affirmed below should be reversed and a new trial ordered.

II.

It Is Reversible Error in a Federal Criminal Trial to Permit a Government Agent to Testify Over Objection to Damaging Admissions Made by the Defendant to an Informer Which the Agent Overheard Through an Electronic Eavesdropping Device Which Had Been Secreted With the Consent of the Informer Under the Front Seat of His Automobile, the Scene of the Overheard Conversation, When the Informer Is Not Called to Testify by the Prosecution.

It is clear that *On Lee* v. *United States,* 343 U. S. 747 (1951) but for the right to counsel issue would otherwise control the case at bar if one were to entertain the doubtful assumption that *On Lee* was still good law. That it is not, is made apparent by the fact that five Justices currently sitting on the Court, Chief Justice Warren, Justices Black, Douglas, Brennan and Goldberg have expressed the view that *On Lee* was wrongly decided. See *On Lee* v. *United States* at 758 (dissenting opinion, Black, *J.*); *Lopez* v. *United States,* 373 U.S. 427-441-71 (1963) (concurring and dissenting opinions). This case therefore which factually parallels *On Lee* should formally sound its death knell as authority in the Federal Courts.

In *Lopez* at 441-446 (concurring) the Chief Justice expressed the view that a government agent may not testify to a defendant's damaging admissions surreptitiously elicited from him by an informer, which he overheard as a result of electronic eavesdropping, when the informer is not called by the prosecutor to testify. Electronic eavesdropping may not thus be employed to obviate the prosecution's need to put the informer on the stand where he would be subject to the defense's cross examination. At best its product may only be used to corroborate the testimony of a government agent who elicited admissions from an accused.

This is the outer limit that must be established as a rule of evidence in the federal courts, Rule 26, Fed. Rules Crim. Pro., in order to protect the privacy of the individual from the threat posed by the fantastic advances made in the field of electronic eavesdropping, Dash and Knowlton, "The Eavesdroppers", *Lopez* footnotes 14, 15, 16, 17. That these advances pose grave Constitutional questions under the Fourth and Fifth Amendments has been long recognized and as a result thereof these considerations require this court, at the very least to in the exercises of its supervisory authority, over criminal justice in the federal courts, hold that the receipt of Agent Murphy's testimony under the facts and circumstances of this case constituted reversible error.

One further point needs to be mentioned, which is topical throughout our country and was touched upon in footnote 16 of the *Lopez* case, to wit, the advertising, availability and possible use of these highly sensitive eavesdropping machines, see Appendix B, to be used upon "your friends or enemies" with or without their consent.

Science seems to have today outdone the "Snooper", mentioned in footnote 12, *Lopez*. An exact copy of the advertisement, as it appeared in a national magazine describes this, dress shirt, pocket size, fully transistorized tape recorder of conversations as "just plain fun" . . . "ideal for practical business use."

In Orwellian 1984, there were portions of the room where you could hide from the telescreen. In present day 1963 a face to face business conversation can be easily and inexpensively bugged by a "Candid Recorder" in a shirt pocket weighing less than 1 lb., dimensions 2½" x 6¼" x 1⅝".

Surely to quote Judge Benjamin Nathan Cardozo in *Shepard* v. *U. S.*, 290 U.S. 96, 54 Sup. Ct. 22, 78 L.Ed. 196 (1933);

> "We have reached a high water mark beyond which we shall not go".

In the *Shepard* case, *supra,* Judge Cardozo also said:

> "The reverberating clang of those accusatory words will drown out all weaker sounds."

It is submitted that the inculpatory words, as set forth in Appendix A, the conversation between Massiah and Colson, as related by Murphy, did *in fact* drown all weaker sounds. At the trial the sequence of events transpired as follows:

The jury retired at 11:45 P.M. Their first request was for a copy of the indictment, a logical and normal request. Then at 2:50 P.M. as their second request sent the following note:

> "May the jury see that portion of the transcript or hear that portion of it read that covers Massiah's conversation with Colson's car."

On Pages 1841 to 1854 of the record, the subsequent argument on this jury's request is set out verbatim. Their request was denied and they were left to their own recollection.

However, this incident and interlude only emphasized the fact that the eavesdropping testimony played a substantial part in the conviction of Massiah. But for it, the result may well have been different, but the law is definite that it is not our province to prognosticate or more accurately, speculate.

In such a case, a reversal or new trial is in order that the injustice of the illegal evidence is like a poison, that slight that it may be runs, through the system and contaminates the whole.

Conclusion

For the reasons stated above, it is respectfully submitted that the judgment of the Court below be reversed.

Robert J. Carluccio
Counsel for Petitioner

Edmund Allen Rosner
of Counsel

Dated: August 27th 1963

APPENDIX A

Finbarr J. Murphy—for Government—Direct

• • • • • • •

Q. Do you see the defendant Massiah in the courtroom? A. Massiah is the defendant furthest on the left.

Q. Agent Murphy, did there come a time when you saw the defendant Massiah and the defendant Colson together? A. Yes; there did.

Q. When was that, sir? A. That was on November 19th, 1959.

Q. And where did this meeting occur? A. The meeting occurred on West 146th Street, between Seventh and Eighth avenues at approximately 9:30 p.m. in the evening.

Q. And were they on the street? A. No. This meeting took place in a car operated by Jesse Colson in 1958—a 1958 Chrysler Imperial.

Q. Were you able to overhear what was said? A. Yes; I was.

Q. By what means? A. Prior to this meeting, with the agreement of Jesse Colson, I had placed a Schmidt portable transmitter under the front seat of that vehicle. This device enabled me to pick up the conversation as I am sitting (1399) in another car.

Q. Will you tell the jury what you heard Colson and what you heard Massiah say at this time.

> Mr. Carluccio: Your Honor, I seriously object to this evidence and feel that it is illegally and improperly obtained and constitutes a violation of the constitutional rights of my client. It comes under the category of eavesdropping, tape recording, wiretapping. Also I submit that, being that it was placed under the seat, the back seat, as he states, and I believe at the request of the government, with the cooperation of Jesse Colson—
>
> May I ask this question:
>
> Did Jesse Colson cooperate in helping you to place this transmitter behind the seat of the car, Mr. Murphy?

The Witness: Yes; he did.

Mr. Carlucci: —with his cooperation, wherein Jesse Colson was acting as an agent for the government, that this also constitutes entrapment, and this evidence is illegal and inadmissible, and it should not be admitted at any time in this trial.

Mr. Pogoda: I further object that unless this witness can testify he observed the two of them (1400) and only the two of them in the automobile, the conversation cannot be identifiable unless this witness is prepared to swear that he knows the voices of both people and knew the voices of both people at the time the alleged recording or transmitting or transmission was made.

The Court: Are you prepared to have the witness testify that he recognized the voices?

Mr. Starkey: Yes, your Honor. He previously testified that he talked to Massiah on May 6.

By Mr. Starkey:

Q. Did you recognize his voice on this occasion in November?

Mr. Pogoda: If the Court please, the conversation with Massiah was on May 6th of 1958. There was one conversation. And here we have a conversation on November 19, 1959, a year and a half later. I submit that the one conversation is insufficient as the basis for the recognition of a transmitted telephone voice, and I object to any such response to the question asked by Mr. Starkey.

The Court: Is that the only time you heard the voice of Massiah prior to this recording?

The Witness: No.

(1401)

The Court: This really was not a recording, was it?

The Witness: No. It was transmitted through the air.

The Court: It was a transmission?

The Witness: Yes.

The Court: Received simultaneously by you by radio, I guess?

The Witness: I have earphones to pick it up.

A. (Continuing) Subsequent to the arrest of Massiah, I believe I spoke to him in the Federal House of Detention.

Q. Have you spoken to Massiah since then? A. Yes. I have spoken to Massiah in your office, in November of 1960. I spoke to Massiah—I had a conversation with him in the office of Callandra, I believe, when he came up to look at these particular exhibits here.

Q. Do you have any doubt that the voice you heard over the Schmidt device was Massiah's voice? A. No doubt at all, my reasons being that I had been speaking with Jesse Colson.

The Court: Wait just a minute, please.

The question before the Court now is whether or not you recognized this voice, which was coming over, as (1402) the voice of Massiah. We are not interested in what anybody told you about it. We are interested in finding out whether or not you recognized Massiah's voice.

The Witness: Yes. I recognized it.

Q. Could you also view the conversation as it took place? A. I could.

The Court: You were looking at these people at the same time?

The Witness: Oh, yes, sure.

The Court: You were looking—

The Witness: I had them under observation visually and electronically.

The Court: I see. And you could see that there were only two people in the car?

The Witness: There were only two people; the driver and the defendant Massiah.

The Court: And you were familiar with Colson's voice?

The Witness: Oh, yes, quite familiar.

The Court: You had been talking to him daily for weeks, I assume?

The Witness: Months would be more like it.

The Court: Months?

The Witness: Yes.

(1403)

The Court: And did you recognize Massiah in the car physically by seeing him?

The Witness: I recognized him just opening the door, and when he got inside I recognized him also.

The Court: In other words, you recognized him as the defendant, and as the other person in the conversation with Colson?

The Witness: I did, sir.

The Court: What was the date of this conversation?

The Witness: November 19, 1959.

The Court: And this was after Colson's arrest?

The Witness: Yes. Colson was arrested in July, 1959.

Mr. Carluccio: Your Honor, if the Court please, I also wish to make known to the Court one other reason for my objection, and that is the best evidence rule. I feel that if this is a conversation between Colson and Massiah, and Colson was present at the conversation, that Colson should be brought in to testify as to what was said and how it was said.

Mr. Starkey: Your Honor, I object to—

The Court: Wait a minute.

Mr. Carluccio: The reason being twofold: (1404) Colson is available for testimony—

Mr. Starkey: I cannot let this go any further, your Honor. This is gross misrepresentation on the part of the attorney.

The Court: The jury will disregard what counsel on either side will say here as to the availability of Colson. The jury is not informed as to the availability of Colson.

Mr. Carluccio: When we find that he is alive—not that he has passed away—however, that Colson can testify as to what was said, and I make also the analogy with the tape that we had introduced with the rag: it is not a photograph of the tape, so likewise, the best evidence in this instance is the conversation as Colson heard it from Massiah, in addition to which, as your Honor well knows, the reason for this conversation, most probably, was to pump the defendant for admissions, and if they are admissions against my client's interest, it has always been a rule of law that admissions may be explained, the full circumstances around the admissions and how the statements were made.

In this respect I can't cross-examine an inanimate tape recording, because all Mr. Murphy will be stating in his examination by Mr. Starkey will be the (1405) inanimate words of what he heard on this machine, this tape recording.

If Colson is here to testify, we can find out not only what was said, your Honor, but how it was said, the demeanor of the parties, where it was said in a jocular fashion, whether it was said in a serious fashion, and the like. And I feel that if counsel wishes to bring out admissions, they should be brought by the best evidence, Mr. Colson, who was there, not a hearer of an inanimate recording, so that our right of cross-examination is not curtailed.

The Court: That is overruled. The Court is going to admit the language as far as possible as to what Massiah said, not what Colson said. In other words, I don't want you to give what Colson said at all. I just want you to give what you heard, as the words came from Massiah's mouth.

The jury is also instructed that this evidence is binding only on the defendant Massiah. This evidence is not to be construed in any way with reference to the guilt or innocence of the other defendants on trial. This is evidence only as to the defendant Massiah.

All right. You may proceed.

Mr. Starkey: In regard to the application (1406) of the defense just now, I would merely like to state for the record that I have submitted to the Court and defense counsel the government's memorandum of law citing On Lee, in which the Supreme Court ruled on this precise question.

The Court: All right.

By Mr. Starkey:

Q. What was said by Massiah during the course of this conversation? A. Massiah stated—

The Court: Wait just a minute, please.

Delete from what Massiah said anything about anybody else participating except Massiah. Do you follow me?

The Witness: Yes.

The Court: In other words, don't give us anything about anybody but Massiah, since this is only binding on Massiah. Omit from your testimony anything with respect to any other person, including the defendants in this case.

Mr. Pogoda: If the Court please, if there is a typewritten transcript of the conversation, I think the defense should have the opportunity to examine it.

The Court: Yes.

(1407)

Q. Now, will you proceed, Agent Murphy. A. The defendant Massiah stated that during this time he had made a million mistakes and that instead of fighting each other, they should be fighting hard to win this case. He stated that while in Valparaiso, Chile, at the home of Rene Huasaff, he sat down and wrote a letter to New York stating the exact amount of cocaine he was bringing in, the exact amount that Rene Huasaff expected of him. He said this letter was written in the presence of Rene and his wife. He stated that he had the cocaine in his room in a suitcase for approximately 22 days, and that two

days out of New York he noticed the cocaine was evaporating. He got the roll of tape and attempted to make it airtight so that there would be no further evaporation. And he stated that it was this tape that got him in all this trouble.

Q. Do you recall any further conversation? A. Yes. He stated that on arrival he met a longshoreman and that he motioned him through the passageway to show him where the cocaine was sitting, and that while walking through the passage way he saw two big men following him. He states that, "Jesus Christ, they must have been bulls"—the exact words. To that he said, "I told the longshoreman to come back later, it was too hot."

(1408)

He stated that he intended to give the longshoremen all the cocaine at that time.

Q. Do you recall anything about the informer? A. He stated that the informer—it's a bit difficult to get this across. He stated that he knew who the informer was in this case, and that he thought that besides the informer there were other people involved. He stated that, "If they knew so much about my meeting Rene in his truck in Valparaiso;" that the Feds must have been watching him a lot longer than what they had anticipated.

Q. Can you recall the exact words about the informer? Were any names mentioned? A. Yes. The informer was named as Frank Torres.

Q. Was anything else said? What was said, Agent Murphy? Were any other possibilities discussed? A. Yes. The defendant Massiah stated that he was not stealing from the packages as they were coming in in the past, and he could not see how anybody could accuse him of stealing from any of the packages, because it was not in his makeup to steal, and if he did, he would be afraid of revenge on the part of his fellow-conspirators.

Mr. Carluccio: Objection, your Honor, (1409) especially as to the last part.

Mr. Starkey: The government consents to strike out "conspirators".

Mr. Carluccio: "fellow-conspirators"—that whole phrase.

The Court: The motion of counsel to strike is granted, and the jury is instructed to disregard that part of the testimony.

Q. Was May, the chemist, mentioned? A. Yes. The defendant Massiah stated that besides Frank Torres, he had just remembered that the biggest informer of all—the exact words—the biggest stool pigeon of all was a woman he identified as May, a federal stool pigeon, and it could have been May, because he had some dealings with May. And besides the information they probably got together, the Torres information, "and that's how I was fingered."

Q. And you said a chemist was mentioned? A. Yes. Massiah stated that at one time, while in Valparaiso, he remembered Rene introducing him to a chemist by the name—he didn't mention his name—he said a chemist with a gimpy leg, and he thought perhaps it was also the chemist who could have put the finger on him besides Torres.

(1410)

Q. Did he say why he thought this? A. Yes. He stated that during the transaction this man stood right there, and he was present while the transaction was going on in the past. And he had personal knowledge of just what was transpiring.

Q. Was anything said about a misapprehension by Colson? A. Yes. Massiah stated that Rene questioned him as to who was going to get the load.

Massiah stated that Colson was to get the load, that he was going to handle all the distribution of it.

Then Colson—Massiah stated that, "I told Rene it was all for you and that I have no intention of stealing anything."

• • • • • • •

APPENDIX B

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20553

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

C 156-

UNITED STATES OF AMERICA,

—v.—

WINSTON MASSIAH,

Defendant.

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York,

WINSTON MASSIAH, the defendant, unlawfully, wilfully and knowingly did bring on board, had in his possession or control on board a vessel of the United States, while engaged on a foreign voyage, a narcotic drug; to wit, approximately 3 pounds, 8 ounces, and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship stores.

(Title 21, United States Code, Section 184a)

.....

Foreman

PAUL W. WILLIAMS
United States Attorney for the Southern District of New York

20553

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

C .....

UNITED STATES OF AMERICA,

—v.—

WINSTON MASSIAH and JESSE COLSON,

Defendants.

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, WINSTON MASSIAH and JESSE COLSON, defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

20553

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

No. 61 Cr.

UNITED STATES OF AMERICA,

—v.—

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, a/k/a "LEON", meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approx. 40 yrs. old, approx. 5'9" tall, and weighing approx. 165 lbs.,

Defendants.

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, WINSTON MASSIAH, JESSE COLSON and MITCHELL ANFIELD, the defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. I, 1–19) is reported at 307 F. 2d 62.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1962 (R. I, 20).[1] A petition for rehearing was denied on October 23, 1962 (R. I, 21), and a petition for rehearing *en banc* on October 31, 1962 (R. I, 22). On November 23, 1962, Mr. Justice Harlan extended the time within which to file a petition for a

[1] "R. I." refers to the 24-page record containing the proceedings in the court of appeals and this Court. "R. II." refers to the 110-page transcript of the proceedings in the district court.

writ of certiorari to and including December 3, 1962 (R. I, 23). The petition was filed on November 29, 1962, and granted on June 10, 1963 (R. I, 24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

After petitioner and some of his co-defendants had been indicted, the government continued its investigation of a narcotics ring in the hope of discovering other members of the ring to which petitioner was believed to belong. By means of a listening device, installed, with his consent, in the automobile of a co-defendant who had turned informer, an officer heard a conversation between petitioner and the co-defendant. The officer testified concerning the conversation at petitioner's trial. The questions presented are:

1. Whether the testimony should have been excluded because the conversation was overheard by an electronic device.

2. Whether testimony as to petitioner's admissions should have been excluded because the conversation occurred after indictment and in the absence of counsel.

STATEMENT

After a jury trial petitioner and several co-defendants were convicted of narcotics offenses in the United States District Court for the Southern District of New York. Petitioner was convicted of possession of narcotics on board a United States vessel (21 U.S.C. 184a); concealing narcotics after illegal importation (21 U.S.C. 173, 174); dealing in narcotics

not in the original stamped package (26 U.S.C. 4701, 4703, 4704(a) and 7237(a)); and conspiracy to commit an offense against the United States with reference to the importation, concealment, and sale of narcotics (R. II, 1–5). He was sentenced to nine years' imprisonment on each of the four counts, the sentences to run concurrently.

On appeal, the United States Court of Appeals for the Second Circuit reversed the conspiracy conviction because of an error in the trial court's instruction (one judge dissenting), but affirmed petitioner's conviction of the substantive offenses (one judge dissenting).

1. In April 1958, information was received by federal customs agents from one Torres, a seaman, that petitioner, who was also a seaman, was bringing into the United States a shipment of cocaine concealed aboard a United States vessel (R. II, 59–60, 92–94). Petitioner had previously told Torres that he knew of the latter's dealings with Colson (from whom Torres had purchased cocaine) and had asked Torres how many "pieces" Torres wanted (R. II, 53–59).[2] As a result of this and other information, agents searched

[2] Petitioner's "girl friend" testified at the trial that in May or June 1956, he had introduced her to Colson, who often came to petitioner's apartment, and that in October of that year petitioner told her that he and Colson were dealing in "coke"—a term which she understood to mean cocaine (R. II, 19–24, 29). On several occasions in 1956, a longshoreman had carried packages ashore for petitioner and was paid for his service. The arrangement ended when petitioner failed one time to pay the longshoreman, explaining that he had no money and that the cocaine had been taken from him (R. II, 30–37).

the ship on May 6, 1958, and found in the "aft peak" five packages subsequently proved to contain about three pounds, eight ounces of cocaine (R. II, 45–49, 66–67, 93–94). The packages were wrapped in a cloth secured by a piece of adhesive tape, which was of the same size, weight, and number of threads per inch as a roll of tape found in petitioner's locker. The jagged end of the piece which had secured the cloth matched the end of petitioner's roll (R. II, 70–78). Petitioner admitted to the agents that he owned the roll of tape, explaining that he had used it on a sprained wrist (R. II, 67–69).

Petitioner was arrested and searched. In his National Maritime Union membership book there was the notation "Renie" and the number 6085 (R. II, 81–82). Telephone records showed that on February 20, 1958, Colson had placed a call to one "Rene Hausaff" in Valparaiso, Chile at number 6085 (R. II, 43–44, 82). On several earlier occasions, Colson had telephoned to Chile in connection with supplies of cocaine (R. II, 44–46), and in February 1958 he had directed another seaman to pick up some narcotics in Valparaiso (R. II, 38–39, 42–43). At the time of petitioner's arrest on board ship, a customs agent observed Colson waiting at the pier (R. II, 92).[1]

2. On May 28, 1958, petitioner was indicted for possession of narcotics aboard a United States vessel (R. II, 106). A second indictment was returned on

[1] Shortly before petitioner's arrival on the ship, while he was still at sea, his "girl friend" received a letter in which petitioner told her to call Colson and advise him that petitioner would bring in some "discos" (R. II, 27–29).

July 20, 1959, charging two conspiracies in addition to the possession offense (R. II, 107–108). In the two conspiracy counts, petitioner, Colson, Hausaff and other unknown persons were alleged to have conspired to possess narcotics on board a United States vessel and to import, conceal and facilitate the sale of narcotics. The instant indictment, which also named a number of other defendants, was returned on March 3, 1961.

3. On July 27, 1959, Colson began to cooperate with the government and had the first of some twenty or thirty conversations with agent Murphy who was in charge of the customs aspect of the investigation (R. II, 94–95).[4] Colson named one "Leon"[5] as "a big connection" and "the biggest buyer" of the smuggled cocaine (Tr. 1517).[6] "Leon's" true identity was not discovered until May 9, 1961, approximately two months after the return of the indictment at bar (Tr. 1472–1476). The identity of defendant Ellis, referred to by Colson only as "Schoolboy," was not discovered until he was arrested in April 1961, approximately a month after this indictment (Tr. 1521–1524).

During the investigation, Murphy, with Colson's permission, placed a Schmidt radio transmitter under

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[4] After he was indicted, Colson told Ellis, an intermediary in various cocaine transactions, that "they was looking for the whole syndicate, everybody was in it, they were looking for them" (Tr. 1021).

[5] Leon was described in a "John Doe" count (R. II, 4).

[6] "Tr." refers to the transcript of the trial which is on file with the Clerk.

the front seat of Colson's automobile, which enabled Murphy to overhear conversations in the car (R. II, 83–84). On November 19, 1959, Murphy overheard a conversation between Colson and petitioner who had entered the vehicle. Later, Murphy overheard (by the same method) a conversation between Colson and Anfield, at a time prior to Anfield's eventual arrest and indictment (R. II, 90–91, 95). At an unspecified time a tape recording was apparently made of another conversation in Colson's car—this one between Colson and Torres, the original informer (Tr. 1178, 1180).

When, at petitioner's trial, the government attempted to introduce Murphy's testimony as to what he had heard over the transmitter on November 19, 1959, petitioner's counsel objected (R. II, 84):

> Your Honor, I seriously object to this evidence and feel that it is illegally and improperly obtained and constitutes a violation of the constitutional rights of my client. It comes under the category of eavesdropping, tape recording, wiretapping.

Counsel also stated that the use of Colson constituted "entrapment." Counsel for defendant Anfield objected on the ground that Murphy had not shown sufficient familiarity with the voices in question (R. II, 84). After it was established that Murphy knew the voices and had observed the parties as they spoke (R. II, 85–86), petitioner's counsel made a further objection, contending that under the "best evidence" rule, Colson should be called to testify concerning the conversation (R. II, 86). Colson had already refused to

testify at a prior trial and, as a result of statements in which he said that he had been threatened and he feared for himself and his family, a mistrial had been declared (see pp. 68–70, 90, of the transcript of the first trial, which is on file with the Clerk of this Court). At the outset of the instant trial, Colson pleaded guilty and said that he was afraid since his wife and children had been threatened with death (both on the street and over the telephone) and he had likewise been threatened (R. II, 16). The court overruled the objections to evidence of petitioner's conversation with Colson. However, it ruled that agent Murphy could not testify to anything Colson had said and that this evidence was only admissible as to the guilt or innocence of petitioner (R. II, 87–88). Similarly, Agent Murphy's testimony concerning statements Anfield made to Colson were later held admissible as to Anfield (R. II, 91).

In his conversation with Colson, petitioner said that he had made a "million" mistakes, but that instead of fighting each other they should be fighting to win the case. He recounted that while in Valparaiso, Chile, he had written a letter to New York in which he stated the amount of cocaine he was bringing in to the United States and that it was to be delivered to Colson. He said that he had carried the cocaine in his suitcase until the ship was about two days out of New York, but that when the cocaine seemed to be evaporating he had attempted to make it airtight with a roll of tape. This, petitioner said, was what had got him into trouble. He went on to recount that, upon arrival, he was motioning a longshoreman through the passageway to show him where the cocaine was located when

he saw two men following him, causing him to send the longshoreman back. He also speculated as to who had informed against him (R. II, 88–90).

Colson's conversations with both petitioner and Anfield had also been tape-recorded over a Minifon device which had been placed in the glove compartment of Colson's car (R. II, 91). After petitioner objected to admitting these tapes on the grounds that they contained statements relating to defendants other than petitioner and contained privileged matters, the district court sustained the objection (R. II, 91–92).

ARGUMENT

INTRODUCTION AND SUMMARY

The issue in this case is whether the district court was obliged to exclude reliable and probative evidence on the ground that it was obtained improperly. The evidence consisted of the testimony of a federal officer as to a conversation he overheard between petitioner and a co-defendant which occurred after their indictment. The conversation occurred in the co-defendant's automobile, and the officer listened by means of a radio transmitter placed there with the co-defendant's permission. The co-defendant was a partner of petitioner in the criminal venture, and there is nothing to indicate that he either coerced petitioner, or induced him by persuasion based on friendship, to discuss his criminal activities.

The use of a transmitter did not violate petitioner's rights under the Fourth Amendment. No trespass

was committed since the transmitter was placed in the automobile with the owner's permission. Therefore, this case does not resemble the situation in which law enforcement officers, either physically or by an electronic device, have entered into a house, office, or automobile without the consent of the owner in order to obtain information. Nor did the government intrude on the privacy of two persons both of whom desired to keep their conversation private. The co-defendant instead of acting as a loyal confederate of petitioner, was in fact acting for the government. This Court has held that the government may use deception to obtain evidence of crime (*Sherman* v. *United States,* 356 U.S. 369, 372); typically, of course, this involves the use of agents or informants. The additional use of a transmitter merely helped to ensure that the evidence obtained by the co-defendant would be reliably remembered and recorded. Surely, if the co-defendant's testimony is admissible, there can be little interest in excluding more reliable evidence of the same conversation because it prevents the suspect from denying what he actually said. *Lopez* v. *United States,* 373 U.S. 427, 439.

Nor was there a violation of the right to counsel or the right to refrain from self-incrimination. The use of the transmitter is completely irrelevant as to each of these rights. The only question is whether the government may deliberately have an informant talk to a defendant after he has been indicted without revealing that he is working for the government. We submit that in the circumstances of this case, where there is no indication that petitioner was co-

ereed or induced by persuasion in the guise of friendship to implicate himself, the government may introduce statements which petitioner freely made.

This case is squarely controlled by this Court's decision in *On Lee* v. *United States,* 343 U.S. 747. There, the Court upheld a conviction where the government introduced testimony of an officer concerning a conversation after complaint and preliminary hearing between an informant and the defendant heard by means of a transmitter. The informant, as in this case, was a confederate of the defendant and consequently deceived him by not revealing his connection with the government. The decision in *On Lee* has been followed by the courts of appeals and has never been limited by this Court.

The only distinctions between this case and *On Lee* make the case at bar considerably stronger for the government. In *On Lee,* since the informant had brought the transmitter into the defendant's store without permission, it was possible to argue that in a sense the informant was a trespasser. Here, the transmitter was located in the co-defendant's own car and a trespass could not possibly have occurred. Moreover, in *On Lee,* the government itself apparently decided not to call the informant; this, as the Chief Justice noted in concurring in *Lopez* v. *United States,* 373 U.S. 427, 443–445, prevented the defendant from showing, by means of cross-examination, that his statements were coerced or induced by friendship. In the instant case, the co-defendant, because of fear induced by threats, had refused to testify when

the government tried to call him as a witness at the first trial. Furthermore, the transcript of the conversation showed the circumstances surrounding it, and its introduction by the government was denied on petitioner's own objection.

I

THE AGENT'S TESTIMONY CONCERNING PETITIONER'S STATEMENT TO THE CO-DEFENDANT IN THE CO-DEFENDANT'S AUTOMOBILE WAS NOT INADMISSIBLE BECAUSE IT WAS HEARD BY A TRANSMITTER PLACED WITHIN THE AUTOMOBILE WITH PERMISSION OF THE CO-DEFENDANT

A. PLACING THE TRANSMITTER IN THE AUTOMOBILE WITH THE CONSENT OF THE OWNER DID NOT VIOLATE THE FOURTH AMENDMENT

It is important to emphasize at the outset what this case does not involve. First, no government agent entered a house, office, or other property of any person without his consent, either to listen personally to private conversations or to place a transmitter or recording device which would allow listening to such conversations. Rather, the officers placed a transmitter and recording device within an automobile with the consent of its owner, who was also a party to the conversation. As a result, this case does not involve any kind of trespass no matter how broadly that term is defined. The situation is no different from that which would have been presented if the agent had hidden in the trunk of the car with Colson's consent and thus overheard the conversations.

Second, there was no electronic eavesdropping or other intrusion upon unsuspecting or unwilling per-

sons without the consent of any of them. The constitutional test up to now has been whether there was a physical trespass (*Goldman* v. *United States*, 316 U.S. 129; *Silverman* v. *United States*, 365 U.S. 505; *On Lee* v. *United States*, 343 U.S. 747; *Lopez* v. *United States*, 373 U.S. 427), but we recognize that electronic devices offer ways of spying out and overhearing that may raise serious constitutional problems concerning the right to privacy which perhaps cannot be solved solely in terms of physical invasions. This case, however, involves no such invasion of privacy as might be claimed if law enforcement agencies used an electronic device to pick up from a distance a conversation in a public place between two persons, both of whom intended to preserve their secrecy inviolate. Nor is the situation like that in *Goldman* v. *United States* where investigators used an electronic device to overhear a conversation in a private room. Here we deal with a situation in which one of the participants agreed to repeat the conversation and allowed it to be recorded and transmitted. Whenever two men converse, each takes the risk that the other may relate the conversation to third parties. The electronic device, used with the consent of one participant, is no greater invasion; it is simply more reliable evidence.

Accordingly, the instant case is well within the controlling precedents and presents no occasion to depart from them. This Court held in the *Goldman*,

Silverman, and *On Lee* decisions that, in the absence of a physical invasion of a protected area, the use of listening devices to obtain information does not violate the Fourth Amendment. This rule has been consistently followed by the courts of appeals. *United States* v. *Finazzo*, 288 F. 2d 175 (C.A. 6), certiorari denied, 368 U.S. 837; *United States* v. *Vittoria*, 284 F. 2d 451 (C.A. 7); *United States* v. *Kabot*, 295 F. 2d 848 (C.A. 2), certiorari denied, 369 U.S. 803; *Anspach* v. *United States*, 305 F. 2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Gorin* v. *United States*, 313 F. 2d 641 (C.A. 1), certiorari denied, 374 U.S. 829.

The facts at bar are even stronger than in any of the cases previously decided by this Court since they involve neither trespass nor a significant intrusion upon privacy. In *On Lee*, for example, the conversation between the defendant and his friend (acting as informant) occurred in the defendant's place of business. In *Lopez*, where an agent recorded a conversation between the defendant and himself, the conversation took place in the defendant's private office. In those cases it was argued that there was an intangible form of "trespass" which was committed when the device in effect brought the government surreptitiously into the house or office. Thus, in *On Lee*, Mr. Justice Burton suggested in dissent that the transmitter carried by the informant actually brought the government into the laundry, and that there was in this

sense a "trespass." See 343 U.S. at 766–767. In *Goldman*, Mr. Justice Murphy emphasized in dissent that the detectaphone reached into the privacy of private quarters to hear conversations there even though no physical entry had taken place. 316 U.S. at 139–140. Alternatively, he suggested that "The application of a detectaphone to the walls of a home or a private office constitutes a direct invasion of the privacy of the occupant, and a search of his private quarters." *Id.* at 141.

No such view can be taken of the facts at bar. The government did not, either physically or through an electronic device, enter any place where it had no right to be. The government agent had the right to be physically present or to place the transmitter in the automobile by virtue of the owner's consent. Petitioner, for his part, had no protected interest in Colson's automobile. The government was already present at the conversation since Colson was working with the government. Consequently, petitioner's right to privacy under the Fourth Amendment has not been violated.

B. THE USE OF THE TRANSMITTER WAS A LEGITIMATE LAW ENFORCEMENT PROCEDURE AND THEREFORE THE EVIDENCE SHOULD NOT BE EXCLUDED UNDER THE COURT'S SUPERVISORY POWER

Petitioner contends (Pet. Br. 12) that this Court should hold that the testimony of agent Murphy was inadmissible under its supervisory power. In *Lopez* v. *United States, supra,* 373 U.S. at 440, the Court described this power in a similar case:

> [The supervisory power] must be sparingly exercised. Its application in the present case,

> where there has been no manifestly improper conduct by federal officials, would be wholly unwarranted.
>
> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

Similarly, here, where the government did not violate any constitutional provision, statute, or rule of procedure, there is no reason for exercise of this Court's supervisory power.

1. There is no justification for a general rule barring all evidence obtained by use of electronic devices

This Court refused only last Term in *Lopez* to lay down a general rule that under its supervisory power all evidence obtained by use of electronic devices is inadmissible. 373 U.S. at 440. Accord, *On Lee* v. *United States, supra; Goldman* v. *United States, supra.* There is nothing here to warrant any different result.

A determination as to the propriety of the use of electronic listening devices, regardless of surrounding circumstances, would of necessity depend upon an array of technical information concerning the potentialities of the devices as revealed by experiment and experience. This would require an extensive inves-

tigation. Thus, complex and often conflicting testimony has been developed before a Senate subcommittee which has held protracted hearings on "wiretapping and eavesdropping."[1] This surely is not a case in which to consider or resolve the conflicting views. Indeed, it exemplifies a situation where use of an electronic device was fully justified under all of this Court's precedents. No one took a listening device into petitioner's home, office, or other property; no device was used to overhear a conversation within a building or room from the outside; there was not even intrusion into a conversation which was "private" in the sense that neither party had consented to the use of the device. Rather, the case involves a conversation between petitioner—whose criminal activities were well known to government officers—and a man who agreed to the installation of a device in his own automobile. The transmitter and recorder were intended to obtain reliable evidence concerning a conversation which the informant would describe to the officers. It has been widely recognized that lis-

[1] "Wiretapping, Eavesdropping, and the Bill of Rights," Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2d Sess. (1958); "Wiretapping, Eavesdropping, and the Bill of Rights," Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess. (1959); "Wiretapping and Eavesdropping Legislation," Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 87th Cong., 1st Sess. (1961).

tening to a conversation with the consent of one party raises a very different question from that presented by the use of electronic equipment without the consent of either party. Cf. *Rathbun* v. *United States*, 355 U.S. 107.[4] Consequently, under proposed federal legislation and administrative rules on the subject, the prohibition against electronic eavesdropping would not apply where one party to the conversation consents to the use of the device.[5]

2. Evidence obtained through an electronic device, without a trespass, to record and transmit conversation with the consent of one of the participants should not be excluded

Since the government agent did not commit a trespass or intrude upon ~~destroy~~ the privacy of persons who jointly intended to keep their conversation private, petitioner's claim that his rights were invaded must turn on the fact that he was deceived by a confederate. The deception was that unknown to peti-

[4] See also Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 Minn. L. Rev. 855, 866 (1960). The author, a frequent critic of the use of electronic equipment, recognizes that there is far less objection to eavesdropping on a conversation where one party has consented.

[5] For the latest administrative proposal, see Federal Communications Commission, "Notice of Proposed Rule Making," Docket No. 15262, adopted January 15, 1964. For proposed federal legislation, see: H.R. 13842, 85th Cong., 2d Sess. (1958); S. 1292, 86th Cong., 1st Sess. (1959); S. 1221, 87th Cong., 1st Sess. (1961). The proposed bills, all introduced by Senator Keating, appear to be based on a New York statute which exempts eavesdropping by "consent." New York Penal Law, Sections 738, 813-a.

tioner, Colson was a government informant. Surely, however, no protected right is violated because the government uses informants. This practice has been recognized by this Court not only in *On Lee* but in numerous other cases. *E.g., Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435. The lower federal courts have upheld convictions in hundreds of such cases. Indeed, even in *Lopez,* the defendant was deceived because he didn't know that the government agent was cooperating with his supervisor. Whether the persons used are regular government agents or temporary informants, are friends of the suspect or strangers, the defendants are deceived when they do not suspect that the persons to whom they are talking are working for the government.

The ability to obtain proof by such strategems is of enormous importance to law enforcement. In narcotics and other fields, criminals have taken elaborate precautions to prevent detection, particularly of their leaders. Often the sole method of obtaining evidence admissible in court and sufficient to support a conviction is through the use of informants who deceive criminals into believing that they are fellow lawbreakers. This Court has recognized repeatedly that these techniques are essential to law enforcement. In *Sherman, supra,* in discussing the use of informants, the Court said that "Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." 356 U.S. at 372; accord, *Grimm* v. *United States,* 156. U.S. 604, 610; *Sorrells* v. *United States, supra,* 287 U.S. at 441.

The sole difference between this case and the usual case involving informants is that here a device re-

corded the conversation and a transmitter broadcast it to a nearby agent. However, this did not invade any right of petitioner to privacy. As we have seen, he was talking in someone else's automobile. The only meaningful interest which petitioner can assert is his interest in keeping his conversation private. But, as already observed, Colson could legitimately report the conversation to law enforcement officials or to anyone else. Thus, the transmitter and recording device added nothing except the assurance that the conversation would be reported and recorded accurately.

We have urged that the transmission and recording of conversations between informants and suspects is desirable from the standpoint of effective law enforcement. In contrast, suspects have no significant countervailing interest in preventing such procedures. If the conversation is innocent or the suspect is entrapped, the transmission and recording protect the suspect from erroneous or perjurious testimony. If the conversation is incriminatory, the informant can himself report the conversation to officers and testify at the trial whether or not the conversation is transmitted to agents or recorded. To be sure, if the informant's testimony is not convincingly corroborated, it may be less damaging to the defendant. But this is hardly a line of argument which can aid petitioner: the law of evidence is certainly not designed to exclude the more reliable forms of proof. As this Court stated only last Term in *Lopez*, "[s]tripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's [here the co-defendant's] memory, or to chal-

lenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory." 373 U.S. at 439. See *Todisco* v. *United States*, 298 F. 2d 208, 210(C.A. 9), certiorari denied, 368 U.S. 989; *Carnes* v. *United States*, 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861. The primary purpose of a criminal trial must be the ascertainment of truth. Surely, then, evidence which is constitutionally obtained cannot be inadmissible merely because it is so reliable that it prevents perjury.

C. ANY PREJUDICE RESULTING FROM THE SUBSTITUTION OF THE AGENT'S TESTIMONY FOR THE RECORDING ITSELF RESULTED FROM RULINGS REQUESTED BY PETITIONER

As we have seen, there can be little doubt that an informant can testify as to a conversation he has had with a suspect. We submit that the recording of conversations between informants and suspects, where no trespass has occurred, is a completely legitimate law enforcement procedure. It results in obtaining reliable and probative evidence of inestimable use in the proof of criminal conduct. No less important than its utility in helping law enforcement is the fact that it safeguards defendants from distorted testimony and aids the administration of justice. Informants, in the tension of the situation and in their enthusiasm to help the law enforcement officers to whom they report, may, entirely without malice, interpret conversations in a way which is unfair to the suspect. Similarly, informants may overstep their instructions and entrap a suspect. Even slight

nuances in describing a conversation may be of crucial importance in determining guilt or innocence or an issue of entrapment. Surely, it is preferable that these crucial facts be established by a recording of the conversation itself.[10] And if agents may properly make a recording, there is no reason why it should be inadmissible. For probative and reliable evidence is admissible unless obtained illegally.

The recording of the conversation in this case (which we have filed with the Clerk) would have given assurance that the agent had correctly testified that petitioner had actually admitted his guilt to Colson, and that he was neither coerced nor improperly induced to make the admissions. When the government sought to introduce the recording at petitioner's trial, petitioner objected on the ground that the recording contained evidence against defendants other than the petitioner and privileged matters (R. II, 91). The district court sustained the objection (R. II, 92). We believe that this determination erred on the side of the defendants. Since the government had proved a conspiracy and there is no indication that the conspiracy had ended at the time this conversation occurred, the evidence was admissible against all the defendants. Moreover, the court could have deleted those parts of the recording relating to other defendants or to privileged matters, or given instructionsto the jury as to the use of the evidence.

[10] While a recording can be tampered with, the defendant has the right to cross-examine the agent testifying to its authenticity. The fact that it is conceivable that an agent may perjure himself no more makes a recording inherently unreliable and inadmissible than any other evidence which likewise may be fabricated.

In any event, the recording was excluded on petitioner's objection. Consequently, he is in no position to claim that he was prejudiced by the government's use of less reliable evidence—the testimony of the government agent who overheard the conversation by use of a transmitter. Moreover, this testimony was also inherently more reliable than the testimony of the informant himself (which would clearly have been admissible), if only because the trained agent has the opportunity to concentrate his attention on what he is hearing by means of the transmitter.[11]

D. UNDER THE CIRCUMSTANCES OF THE PRESENT CASE, THE EVIDENCE OBTAINED BY MEANS OF THE TRANSMITTER WAS NOT RENDERED INADMISSIBLE BY THE ABSENCE OF TESTIMONY FROM THE CO-DEFENDANT

In his concurring opinion in *Lopez* v. *United States*, 373 U.S. 427, 441–446, Chief Justice Warren suggested that, in determining whether an agent may testify concerning an incriminating conversation which he has overheard by the use of an electronic device, the presence at the trial of the other party to the conversation may be a significant factor. The Chief Justice suggested that the testimony of the informant may

[11] We believe that the district court also erred on the side of the defendant in not allowing the agent to testify as to the entire conversation. The court, on petitioner's objection, did not allow the agent to describe what Colson had said, apparently on the basis of the best evidence rule (R. II, 87). However, the government had tried to call Colson as a witness at petitioner's first trial, but he had refused to testify and ultimately claimed the Fifth Amendment because of threats made against his family and friends. Moreover, the best evidence rule does not bar witnesses from testifying to conversations they have heard. And, in any event, the government did offer the best evidence, a recording of the conversation.

show the nature of the informant's friendship with the suspect, "the possibility of other unmonitored conversations and appeals to friendship, the possibility of entrapments, police pressure" to persuade the friend to become an informant, and the informant's own recollection of the events. 373 U.S. at 444.

We submit that the admissibility of testimony by the agent should be determined in the same way as other evidence. We would agree that, if the evidence for some reason should appear inherently unreliable, the government would have the burden of showing sufficient reliability to warrant submission to the jury. Consequently, we assume that in some situations the government might be required to introduce the testimony of the informant to a conversation in which he participated. On the other hand, if evidence is reliable and probative, it should be admitted. Once a reasonable measure of reliability is shown, the government need not negate all possible doubts as to reliability nor present cumulative evidence on the same subject. Instead, the defendant has the responsibility of challenging the witness' credibility if he so desires.

Normally, the testimony of a government agent is reliable; indeed, it is likely to be more reliable than that of the informant. He is not subject to the tensions of the informant engaged face-to-face with the suspect; he is concentrating on hearing and remembering what is said; he is trained to remember evidence for purposes of trial; and he is presumably devoted to the honest performance of his duty. The evidence of the conversation can be made even more reliable by admission of a recording—the procedure

which the government attempted to follow in this case. The recording here in fact demonstrates that the agent's testimony was reliable.

Since the agent's testimony was, by all ordinary standards, competent and reliable, the government was not required to present proof negating the possibility that the evidence was illegally obtained. Rather, the burden is on the defendant to make at least a *prima facie* showing to support such a claim. Defendant made no such proffer here. Furthermore, the agent's testimony and the recording show that petitioner was not induced by friendship or entrapped into an admission—even assuming that such inducement or "entrapment" is important with regard to an incriminating statement as opposed to the commission of a crime. Nor do we believe it necessary to inquire whether the government acted properly in persuading Colson to become an informer; its approach to Colson could not violate any rights of petitioner. Cf. *Jones* v. *United States*, 362 U.S. 257; *Wong Sun* v. *United States*, 371 U.S. 471, 492.

In addition, we submit that, under any reasonable approach, the courts would be bound to consider the reason that the informant did not testify. In this case, this was in no way the fault of the government. When the case first came to trial (only two days before the trial resulting in the conviction at bar), Colson was called by the government as its second witness. He said before even being sworn: "I can't testify in this matter. My family has been threatened" (Transcript of the first trial, p. 64). The prosecution confirmed to the district court that such threats had been made (Transcript, p. 42). After

taking the stand, Colson again several times voiced the same fears (Transcript, pp. 68–70):

> Gee, I can't go on with this. My kids, and my wife and my very life are at stake.
>
> • • • • •
>
> • • • You don't understand. My wife is sitting on pins and needles right now with my kids right this minute. I can't live like that forever.
>
> • • • • •
>
> I didn't mean to insult you, Judge. I am sorry, but I am afraid in this thing. My wife has been threatened.

After pleading the Fifth Amendment, Colson was excused without giving any testimony of substance (Transcript, p. 69). As a result of Colson's outbursts, and on the motion of defense counsel, Judge Wright declared a mistrial (Transcript, p. 90). At the outset of the instant prosecution, Colson pleaded guilty and reiterated his fears (R. II, 16). He stated that his wife and children had been approached on the street; that his wife had been called on the telephone; and that he had been approached on the streets by two unknown New York policemen. In each of these instances, he and his family had been threatened with death, and as a result, he had decided not to testify (R. II, 16).

Obviously, then, the government was fully prepared to, and in fact initially did, call Colson to the stand. His ultimate failure to testify was due not to any bad faith or choice of trial tactics on the part of the government, but rather to the effectiveness of threats

against him. Cf. Brief for the United States in *Rugendorf* v. *United States*, No. 223, this Term, pp. 36–37. Until Colson pleaded guilty, the government could not possibly have compelled him to testify. Whether it could do so after his plea, as against a claim that his testimony would incriminate him as to some offense not covered by the charges to which he had pleaded, would in itself have presented a difficult problem. Under these circumstances, the government properly decided to rest on the testimony of the officer who had heard the conversation. To hold that a federal officer could not testify to petitioner's admissions, which the agent had overheard, because Colson had been paralyzed by fear would be to place a premium on intimidation. If Colson's absence as a witness were to be decisive, then any case involving electronic devices would itself invite coercion of witnesses.

II

THE AGENT'S TESTIMONY CONCERNING PETITIONER'S STATEMENTS TO THE CO-DEFENDANT IS NOT INADMISSIBLE BECAUSE THE CONVERSATION OCCURRED AFTER INDICTMENT SINCE THE STATEMENTS WERE FREELY MADE

At the time Colson talked with petitioner in his automobile, both petitioner and Colson were under indictment, and Colson was acting as a government informant. The government was continuing its investigation in order to uncover not only petitioner's source of narcotics but also the intended buyer of the substantial amount he was carrying. The quantity involved was such as to suggest that the ramifications were even greater—that petitioner was part of a large

and well organized ring."[12] It was that ring which the government was out to uncover when it used Colson as an informant. This effort bore fruit since, as the court below stated, it resulted in bringing "broader charges against many defendants" (R. I, 5–6).

The government had the duty of continuing its investigation of the narcotics ring even though petitioner had been indicted. The arrest of petitioner was no guarantee that the ring of which he was a part would cease operation or even that petitioner himself would not participate in some of its activities. It is not unknown for defendants who are out on bail to continue operations, particularly trafficking in narcotics. See, *e.g., Rogers* v. *United States,* 325 F. 2d 485 (C.A. 10), pending on petition for a writ of certiorari, No. 1011 Misc., this Term. In fact, in the very case at bar there was evidence that in May 1961, well after indictment, defendant Aiken brazenly attempted to persuade agent Murphy to go into the narcotics business with him (Tr. 1431–1435). The government was therefore justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.

Agent Murphy's testimony indicates that Colson did not coerce petitioner into making any incriminating statements or even induce him by appeals to talk in the guise of friendship. The recording of the entire conversation confirms this. Petitioner talked freely to Colson concerning their joint narcotics activities.

[12] The district judge, in passing sentence, commented that he was "shocked by the amount of narcotics which has been disclosed by the evidence in this case" (Tr. 1877).

Petitioner obviously did so because he believed that Colson was still his confederate and that they were facing criminal prosecution together. We submit that the government may properly give a defendant the opportunity to make incriminating statements, where the only deception is that he believes his remarks are private. When the defendant makes the incriminating statements freely, *i.e.*, without coercion or improper inducement, there is no reason why such relevant evidence should be excluded at trial.

A. PETITIONER'S RIGHT TO COUNSEL WAS NOT VIOLATED

1. The decisions of this Court establish that the basic reason why government agents are not permitted, in some circumstances, to question suspects in the absence of counsel is because of the inherent potentialities of coercion. Rule 5(a) of the Federal Rules of Criminal Procedure requires that arrested persons be arraigned without unnecessary delay. The purpose of this rule is to prevent "resort to these reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." *McNabb* v. *United States*, 318 U.S. 332, 343–344; accord, *Mallory* v. *United States*, 354 U.S. 449, 452–453, 456. But the Court went on to say in *McNabb* that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible." *Id.* at 346. See also, *e.g.*, *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 157; *Wan* v. *United States*, 266 U.S. 1, 14; *Hopt* v. *Utah*, 110 U.S. 574, 584–585; *Sparf* v. *United States*, 156 U.S. 51, 55; *Wilson* v. *United States*, 162 U.S. 613, 623,

Thus, the Court has determined, under its rule-making power, that because lengthy interrogation by police officers before arraignment is apt to be coercive, confessions obtained during such a period of interrogation should not be admitted in evidence.

This Court has held, in state criminal cases, that confessions obtained by government agents or attorneys are inadmissible only when they are shown to be coerced and therefore not voluntary. *Spano* v. *New York*, 360 U.S. 315; *Culombe* v. *Connecticut*, 367 U.S. 568. On the other hand, the Court has held that state officials may question a suspect after arrest, in the absence of counsel, for the purpose of obtaining a confession as to pending charges when no coercion is shown. *Crooker* v. *California*, 357 U.S. 433; *Cicenia* v. *Lagay*, 357 U.S. 504. While the Court has stated that the rule would be different (under the supervisory power) as to a federal prosecution where the suspect has been denied his request to confer with counsel (*Cicenia* v. *Lagay*, 357 U.S. at 508-509), this is plainly because of the potentially coercive effect of such questioning. Thus, the Justices who would have gone beyond the majority in the state cases noted above reasoned that a confession obtained in the absence of counsel was inadmissible without a showing of actual coercion because secret interrogation so frequently involves coercion. As Mr. Justice Douglas stated in his concurrence in *Culombe*, "The flow of cases coming here shows that detention *incommunicado* is often accompanied by illegality and brutality. The arrival of an attorney is a specific against these proscribed practices." 367 U.S. at 640. Similarly, in

Crooker, Mr. Justice Douglas stated that the right to counsel may "be necessary as a restraint on the coercive power of the police." 357 U.S. at 443. And Justices Douglas and Stewart referred to the interrogation in *Spano* as a "kangaroo court" (360 U.S. at 325) and "midnight inquisition" (*id.* at 327).

Whatever the problems incident to interrogation by the police, that kind of interrogation is not involved here. This case does not involve either coercion or the potentiality of coercion. Petitioner's conversation with Colson had none of the attributes of a "kangaroo court," "midnight inquisition," or "detention *incommunicado*." The conversation took place in an automobile on a New York street. Petitioner was not questioned by anyone who even appeared to be a government agent; rather, his "interrogator" was his own partner in crime, to whom he talked freely. Petitioner was, of course, under no police control or restraint at the time and was free to come and go as he pleased. As the court below said, "It is not disputed that Massiah entered the car of his own free choice and that he was equally free to speak about the case or to say nothing" (R. I, 7).

We do not dispute the proposition that any threatened impairment of the right to counsel would assume particular importance after the start of a criminal prosecution and that the Sixth Amendment requires solicitous protection of that right. We submit, however, that providing a defendant an opportunity to talk does not constitute an infringement of his right to have the assistance of a lawyer in his defense of the charges against him. Indeed, numerous courts have

held that confessions obtained by police officers from suspects after arraignment or indictment are admissible despite the potentiality of coercion. *United States* v. *Carignan*, 342 U.S. 36; *United States* v. *Bellamy*, C.A. 4, decided January 9, 1964 (defendant, as here, free on bail); *Goldsmith* v. *United States*, 277 F. 2d 335, 340 (C.A. D.C.), certiorari denied *sub nom. Carter* v. *United States*, 364 U.S. 863; *United States* v. *Moore*, 290 F. 2d 436, 439 (C.A. 2), certiorari denied, 368 U.S. 858; *Davis* v. *North Carolina*, 196 F. Supp. 488 (D. N.C.), reversed on other grounds, 310 F. 2d 904 (C.A. 4); *State* v. *Murphy*, 87 N.J.L. 515, 94 Atl. 640. *People* v. *Garner*, 18 Cal. Rep. 40, 367 P. 2d 680, certiorari denied, 370 U.S. 929; *State* v. *Kristich*, 226 Ore. 240, 359 P. 2d 1106.

The thrust of the Sixth Amendment is that the provision of counsel is essential to the conduct of a fair trial. *Gideon* v. *Wainwright*, 372 U.S. 335. The admissibility of extra-judicial admissions made by a suspect or an accused turns, as the many precedents indicate, on quite discrete considerations—fundamentally, whether the will of the accused was overborne. In the instant case, as we have shown, there was no semblance of coercion.[13]

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[13] Petitioner notes (Pet. Br. 8–9) that the New York courts have held that either a defendant's right to counsel or privilege against self-incrimination is violated if he is questioned after indictment or arraignment outside the presence of his attorney. However, all the cases cited, except *People* v. *Robinson*, 16 App. Div. 2d 184, 224 N.Y.S. 2d 705, involved interrogation by law enforcement officials when the defendant was in custody. Thus, it can be said that the interrogation was inherently coercive. But see the cases of this Court cited above at p. 29. Moreover, all other jurisdictions have held that in the absence of some showing of

II. PETITIONER'S PRIVILEGE AGAINST SELF INCRIMINATION WAS NOT VIOLATED

We have seen that petitioner was not denied the right to counsel since he was in no way coerced into conversing with Colson. For the same reason, his privilege against self-incrimination was not violated. The Fifth Amendment expressly provides that no person "shall be compelled * * * to be a witness against himself." See *Bram* v. *United States*, 168 U.S. 532. Here, petitioner talked freely to a confederate. Petitioner had no constitutional right to have the confederate remain loyal to him.

In *Stroud* v. *United States*, 251 U.S. 15, incriminating letters written by an accused while in jail were handed over to prison authorities, who in turn gave them to the prosecutor. The defendant argued that he had been tricked because he believed that the letters were handed over for the sole purpose of placing them in the mail. Brief for Plaintiff in Error, No. 276, Oct. Term 1919, pp. 170-171. This Court held that "there was neither testimony required of the accused, nor unreasonable search and seizure * * *." 251 U.S. at 21-22. The lower courts have likewise ruled that the admission of statements obtained through a jail-cell "plant" are admissible. *Young* v. *United States*, 107 F. 2d 490 (C.A. 5); *Application of Graham*, 132 F. Supp. 69 (S.D. Cal.). Those cases are more difficult than the one at bar since the government had custody of the defendant and controlled his move-

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actual coercion, a confession obtained by police interrogation, without the presence of counsel, after the prosecution has started, is admissible. The *Robinson* case involved a jail-cell "plant," which, as we have noted, is also a more difficult case than the one before the Court.

ments. Here, petitioner freely decided to enter Colson's automobile and talk to him. Moreover, numerous courts have held either expressly (see *Bellamy* v. *United States*, C.A. 4, decided January 9, 1964) or *sub silentio* (see the cases cited above, pp. 31-32) that statements made to law enforcement officers after the start of a criminal prosecution do not violate the Fifth Amendment without any showing of actual coercion. *A fortiori*, the Fifth Amendment is not violated when the suspect does not even know that he is talking to a government agent so that even the potentiality of coercion does not exist.

When a defendant is free on bail, he is no more coerced into incriminating himself when he talks to a government informant than is the suspect in an identical situation who has not yet been indicted. Consequently, petitioner's contention amounts to a claim that the government cannot use informants at all. If agents of the government are required to inform suspects of their privilege not to talk, informants obviously cannot talk to suspects and it should make no difference whether or not an indictment has been returned. Here, just as during an investigation prior to indictment, the government agents were seeking evidence not only as to the suspect but also as to confederates in his criminal activity. Thus, the numerous cases (see p. 18) establishing that the government can use informants to obtain evidence from suspects are directly inconsistent with any claim that the Fifth Amendment bars the admission of this evidence here. Furthermore, the claim is inconsistent with numerous decisions holding that law enforcement agents may question suspects without informing

the suspects of the privilege against self-incrimination. *E.g., United States* v. *Block*, 88 F. 2d 618, 620–621 (C.A. 2), certiorari denied, 301 U.S. 690; *Himmelfarb* v. *United States*, 175 F. 2d 924, 938, note 6 (C.A. 9), certiorari denied, 338 U.S. 860, and the cases therein cited. In the case at bar, the conversation between petitioner and Colson was not affected by even that degree of constraint which may result from a suspect's knowledge that he is talking to a law enforcement officer.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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